DEPARTMENT OF JUSTICE

HOUSTON, WE HAVE A COMPETITIVE PROBLEM: HOW CAN WE REMEDY IT?

Address by

DEBORAH PLATT MAJORAS
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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It is a pleasure to be in Houston. Years ago, I spent months in Houston working on a response to an extensive Second Request with our host today, Bruce McDonald. Bruce and I were at different firms but on the same side, and after a bit of jockeying for control (about 5 minutes worth), we concluded that we could most efficiently and effectively achieve our collective goals by forming a joint venture consisting of two overworked associates. It did, in fact, achieve substantial efficiencies, as well as a friendship that has endured through the years. Thank you, Bruce, for your invitation to speak here today. I promise not to discuss Second Requests.

It has been one year since we arrived at the Antitrust Division. Criminal enforcement continues to be quite active. Mergers remain an important priority (that is, when we have mergers to review). Hart-Scott-Rodino filings are down by two-thirds from their volume in FY 2001, and three-quarters from their volume in FY 2000. We have several civil non-merger cases in various stages of litigation — *Microsoft, American Airlines, MasterCard/Visa, Dentsply* — and investigation. We have a healthy international agenda, which includes forming the International Competition Network last fall.

We have also taken some important steps to improve the effectiveness and efficiency of the Antitrust Division. First, we have reorganized our sections and their responsibilities. Second, we have undertaken an internal re-engineering effort to improve internal communication, knowledge management, and efficiency. Third, we have

reformed the Division's merger review process. Finally, we have entered into a new clearance agreement with the FTC.

We have also identified a number of policy initiatives. For example, the Division and the FTC have been holding joint hearings on competition and intellectual property law and policy. Another area we have identified that requires a policy review is remedies, and merger remedies, in particular. That is what I would like to focus on today.

The Division's Remedies Review

During the mid- to late 1990's, the topic of "remedies" in merger enforcement was widely discussed, as members of the bar and the business community recognized that the vast majority of merger challenges were not litigated, but rather were resolved through negotiation culminating in consent decrees. This reality necessarily focused more attention on the remedy, rather than the violation, because parties to consent decrees do not contest the violation. The debate extended into analyses of what types of remedies are appropriate for settling merger challenges, resulting in criticism, for example, of the FTC's insistence on prior approval clauses in consent decrees. Interested parties, and particularly counsel representing merging parties, have struggled to discern the agencies' policies on remedies, if any, apart from general practice. Some believe that one negative consequence to "litigation by consent decree" is the lack of global transparency as compared to litigation in court. Some express concern about whether enough remedies have been litigated so that the agencies have appropriate guidance from courts.

The FTC's "Study of the Commission's Divestiture Process," released in 1999, created further discussion and focused us on the fact that, even after 25 years of merger activity under the Hart-Scott-Rodino model, there is a lot we do not know about remedies. In the non-merger context, the *Microsoft* case has prompted extensive discussion about appropriate remedies, beginning when the Division first sought a break-up of the company and continuing today as the Division awaits approval of its settlement, and as nine (9) states and the District of Columbia press for further relief.

The Antitrust Division has begun a top-to-bottom review of its practices and policies with respect to seeking and securing remedies in merger enforcement, whether in litigation or through consent decree. Our desire is to provide better guidance (notice that I said "guidance," not Guidelines!), both within the Division and outside. The FTC is undertaking a parallel review of its remedies practices, and in March, it announced plans to conduct public workshops to explore modifications and improvements to the Commission's use of specific remedy provisions. The two agencies are working together to identify "best practices" in developing and implementing remedies.

We begin our review of remedies from a perspective that includes some important principles. First, the Division will not consider a proposed remedy unless it is confident that there is a violation requiring redress. Parties often propose remedies prior to the conclusion of the Division's investigation, which can efficiently save the taxpayers, the parties, and third parties time and expense. But the Division will not accept remedies simply to avoid investigative work. Consumers would not be benefitted if we secured a

"scalp" when there was no violation. Indeed, if we do, they could, in fact, be harmed. Now, obviously, some of the inherent benefits of settlement would be lost if the Division insisted on investigating every merger up to the point of filing litigation before it would consider a resolution. When a party wishes to discuss a possible settlement, the Division will determine whether it has enough information at that point to effectively consider whether there is, in fact, a violation to redress. If the Division determines that it does not yet have enough information but still believes it is in the public interest to discuss or pursue a resolution, the Division will work closely with the parties to obtain quickly the additional information it needs. At bottom, we will not accept remedies for which we would not be prepared to litigate.

Second, the Division must be satisfied that, as far as our predictive abilities will take us, the remedy will effectively redress the violation. Naturally, when parties propose remedies they are trying to guess how much it will take to satisfy the Division so that they can close their deal and move on. As in any other bargaining situation, they tend to start low, wanting to give the bare minimum that is necessary, and they prefer the fix that is *least* likely to provide them with viable competition going forward. Third parties, such as competitors and customers, when offering remedial suggestions, naturally want a "fix" that is broad or narrow enough to best position them in the marketplace. We agree with the goal of requiring the minimum necessary to maintain competition at premerger levels; the trick is determining what that means. Again, we will not take a likely ineffective fix just to bolster our statistics or to get on to the next matter.

Third, the Antitrust Division is an enforcement agency, not a regulatory body. Consistent with this enforcement role, the Sherman and Clayton Acts authorize the Division to seek and procure a remedy any time it proves a violation of federal antitrust law. But having proven a violation, the goal is not to review the market and decide how it would best operate. Rather, the goal is to effectively remedy the violation for the benefit of consumers, maintaining competition at premerger levels. Once the violation is remedied, competition will decide how the market performs, including choosing the winners and losers.

Fourth, particularly in today's economy, there is no "one-size-fits-all" for remedies. Rather, the Division must be flexible and creative in devising remedies. If remedies do not keep pace with the ever-changing dynamics of competition, they either will not work or will harm the very competition they are intended to maintain. This is not to say that the Division will not continue to rely on past precedent where it has worked; our staff's learning on the subject, gained over decades, is invaluable when engaging in the process of choosing an effective remedy. It is true that hard-and-fast rules about what the Division requires upon a determination that a merger would violate Section 7 would make things easier for the Division, as well as for businesses that may crave certainty above all else. We believe, however, that the dangers of tilting remedies in favor of the one-size-fits-all variety outweigh the benefits of the certainty that it brings. It hardly makes sense to undertake a heavily fact-oriented analysis to predict whether a violation

has or will occur, only to then use strict rules for devising remedies, without that same fact-based analysis of the likely efficacy.

Finally, in devising remedies, the Division must be mindful that the remedy may have unintended consequences in the marketplace. Our ability to predict such consequences is, at best, equal to our ability to predict that a merger may substantially lessen competition and that the remedy in the first instance will prevent that lessening. Still, it is something that we must keep in mind given our ultimate goal of protecting competitive markets for the benefit of consumers.

Issues in Merger Remedies

There are several important issues we confront as we undertake to review our practices and policies regarding remedying violations. I will highlight a few here.

1. Up-front Buyers

One of the hottest remedy topics over the past several years has been up-front buyers. In traditional consent decrees, the parties to a transaction are permitted to consummate the deal as long as they agree to divest specified assets within a set amount of time. Under the typical up-front buyer approach, the parties may not consummate the deal until they have found, and obtained approval for, a buyer. In the late 1990's, the FTC announced that it would require more frequent use of up-front buyers. By the beginning of 2000, the FTC had required up-front buyers in well over half of its cases in which some form of non-behavioral relief was required. During this same time period,

the Division did not adopt a similar policy and did not require an up-front buyer in any consent decree. Obviously, that difference is worth exploring.

Requiring up-front buyers can have both advantages and disadvantages, depending on the facts of a particular case. It certainly shifts to the parties the risk that a suitable purchaser for the assets will not be found. If the parties cannot find a suitable buyer, they cannot consummate their transaction, which provides the parties with a greater incentive to quickly find an acceptable purchaser. In addition, requiring up-front buyers may give the agencies the opportunity to better evaluate whether the divestiture assets will be viable and effective in the market when combined with the purchaser's business.

The up-front buyer requirement may also have significant disadvantages. First, it can delay consummation of the transaction while the parties find, and obtain approval for, a buyer. Assuming the transaction has procompetitive components, this delay may have costs in the market. Second, an up-front buyer requirement can lead to strategic behavior by the potential purchasers who are given greater leverage in the negotiations. This may skew the bidding process in a way that is inconsistent with the agencies' goal of preserving competition in the market.

2. Clean Sweeps

Another hot topic has been the "clean sweep." When a clean sweep is required, the parties must divest one party's ongoing business, as opposed to divesting a "mix and match" of both parties' assets, to cure the competitive problem. In the wake of the Divestiture Report, the FTC adopted the policy of requiring more clean-sweep

divestitures. Although the Division has not adopted this as a policy, we do consider clean sweep as an option when we look at a divestiture package.

The obvious advantage to requiring a clean sweep is that the sale of an ongoing business, as opposed to various stand-alone assets pieced together, may provide greater assurance that the assets will be viable in the hands of a suitable purchaser. Such a policy also prevents the parties from choosing the least attractive assets from each company for divestiture — the so-called "cats and dogs." The potential disadvantage for requiring a clean sweep is that it prevents the parties from realizing possible efficiencies by integrating the different assets of both companies.

3. Less Than Divestiture

In the past, the agencies have been apprehensive about accepting remedies such as licenses or supply contracts, rather than insisting upon the divestiture of "hard assets," such as factories or offices. The concern has been that such remedies are vulnerable to manipulation by the parties, often require continuing contact between the merged party and the acquirer, and are not as effective as divestiture remedies. In today's economy, however, competition in some industries may depend solely on such contractual arrangements.

In the recent 3D/DTM case, the Division accepted a licensing remedy. That case involved the merger of two of the only three companies producing industrial rapid prototyping systems in the United States. These systems are used to create prototypes and models for use in the development of a wide range of products, including

automobiles. While there were three non-U.S. firms that could produce these systems, the patents of the U.S. firms prevented the non-U.S. firms from entering the U.S. market.

The Division brought suit to block the transaction, and after we sued, the parties proposed a resolution. We ultimately secured a consent decree requiring 3D and DTM to license on a non-exclusive basis the parties' portfolio of intellectual property necessary to allow one of the foreign competitors to offer its products in the United States. The required license was limited to the specific field of use for the type of prototyping technology the acquirer currently utilized outside of the United States. The decree also included a provision for the sale of one of the parties' assembly plants, at the option of the purchaser.

In this case, the Division chose to require the non-exclusive licensing of technology, as opposed to requiring the parties to divest hard assets, such as offices, research facilities and a full set of manufacturing plants. After all, the competitors were just a license away. The remedy was carefully tailored to address the competitive harm — ensuring that there remained three strong competitors in the United States — without unnecessarily limiting the transaction contemplated by the parties, thereby allowing them to realize the efficiencies from combining their two technologies.

4. Firewalls

This issue often arises in cases involving partial ownership — where one company does not technically control another, but does exercise some level of influence through stock holdings or otherwise. Partial ownership can raise antitrust issues when the two

companies or their subsidiaries are competitors. The concern is that the partial ownership will allow one company to influence the other and allow for the exchange of competitively sensitive business information between them, thereby reducing competition.

In the past, the antitrust agencies have preferred structural remedies to cure such partial ownership concerns over the use of Firewalls for many of the same reasons that structural fixes are preferred over non-structural ones, as discussed above. Structural fixes, such as the divestiture of stock, remove any contact between the two companies and do not require continued monitoring. They are also less susceptible to potential manipulation by the parties.

Although the Division has not favored the use of Firewalls in the past, it did require them before approving L-3 Communications' proposed acquisition of Allied Signal's Ocean Systems business. The proposed acquisition raised competitive concerns because Allied Signal and Lockheed Martin, which held a 34% ownership interest in L-3, were two of the leading competitors in supplying towed sonar arrays to the Department of Defense. In order to ensure that the two sonar array competitors would remain independent of each other, the Division required the companies to erect a firewall that would prevent the exchange of non-public information between them. The Division agreed to use the firewall in this instance, as opposed to requiring Lockheed to divest its partial ownership interest in L-3, because of the limited nature of the competition between the two sonar array companies. The two companies were currently competing

for a long-term contract with the Department of Defense. Because the Department of Defense was the only customer for these sophisticated arrays, once the bid was awarded, the companies would not compete for the foreseeable future.

5. Length of Decrees

In the past, the Division has required that most decrees remain in effect for ten years. The advantage of requiring a longer decree is that its protections have more time to address the competitive harm at issue. Having a standard decree length also avoids protracted negotiations on this issue. The potential disadvantage is that the decree's provisions may become outdated, and possibly harm competition in the long term.

In the *Microsoft* case, the Division agreed to a consent decree with a five-year duration, with a possible two-year extension for willful, systematic violations. The five-year term does not signal a new policy for all decrees or even for decrees in high-tech industries. Rather, it was chosen because the circumstances in that case warranted a decree for such a term. Five years is a long time in the rapidly-changing software industry. A five-year term allows for the conduct remedies to take full effect without the risk that in eight or ten years the remedies would be obsolete or even affirmatively harmful to the market.

6. Crown Jewels

Both the Division and the FTC historically have used crown jewel provisions in certain instances. A crown jewel term requires the parties to sell more desirable assets if they are unable to sell the primary divestiture assets. A crown jewel provides the parties

with a greater incentive to divest the primary assets. It also helps to ensure that there will be an effective divestiture even if the primary assets cannot be sold. Crown jewels can have disadvantages as well. Potential purchasers may be able to intentionally delay the divestiture of the primary assets so that they may acquire the crown jewel assets. Further, the crown jewel assets may include assets that exceed what is required to fix the competitive problem.

In the past, the Division has used crown jewels in cases in which there is a complex divestiture process or some concern that there may be difficulty in divesting one set of assets. For example, in the context of The Thomson Corporation's acquisition of the computer-based testing business of Harcourt General, Inc. from Reed Elsevier Inc., the Division required the defendants to invite bids on two asset packages, with the second package containing all of the assets in the first package plus additional assets related to the testing business. By allowing potential purchasers to choose between the two packages, the Division sought to increase the likelihood that a suitable purchaser would be found.

7. Monitoring Trustees

Both the Division, and the FTC to a greater extent, have included monitoring trustees in their consent decrees in the recent past. Typically under this term, an independent monitor may be appointed immediately upon execution of the decree to monitor the parties' compliance with the settlement. The use of a monitoring trustee may be helpful for decrees that provide for a very short divestiture period, a complex

divestiture process or package, or on-going agreements with the parties and the buyer, such as supply agreements. One disadvantage to using monitoring trustees is their expense and other costs of "regulation."

One example of a Division consent decree requiring a monitoring trustee is the one involving the Allied Signal/Honeywell merger. In that case, a monitoring trustee was used because the divestiture period was relatively short (about 4 months), and the divestiture package was relatively large and complicated. The monitoring trustee was used to assist the Division in monitoring the parties' compliance with these complex obligations.

8. Litigated Fixes

If the antitrust agencies reject a fix proposed by parties to a transaction being reviewed under Section 7 of the Clayton Act, the parties some times may attempt to "litigate the fix" in court. Typically under this approach, the parties will modify the transaction to incorporate the fix and argue that the court should review the revised transaction under Section 7. In the past, the antitrust agencies have resisted allowing parties to litigate fixes in this manner, and have argued that the court should reject evidence of the fix and review the original transaction.

A recent example of a litigated fix before the Division is the pumps case — U.S. v. Franklin Electric, 130 F. Supp.2d 1025 (W.D. Wis. 2000). In that case, Franklin Electric and United Dominion Industries proposed a joint venture that would combine the only two domestic firms offering submersible turbine pumps, primarily used to pump gasoline

from the underground tanks at retail gasoline stations. The parties proposed a fix whereby they would license one of two companies to manufacture the pumps. The Division rejected the fix because neither of the two companies had ever made pumps, the merged company would supply the licensee with pump motors, and no definitive license agreement had ever been reached.

The Division brought suit to enjoin the joint venture on May 30, 2000. On May 29, the parties amended the joint venture agreement to include the proposed third-party license, although no license agreement existed at that time. The Division sought to exclude evidence at trial regarding the fix, filing a motion in limine. Although the court did not grant the motion, it permanently enjoined the joint venture, finding that the proposed license agreement was inadequate to ensure the long-term existence of a viable competitor. Thus, the court found that the joint venture would impair competition even with the proposed license.

These are just some of the issues that we will be exploring in the coming months. Now, let me turn to the Microsoft remedy.

The Microsoft Remedy

To say that the United States' settlement of its antitrust case against Microsoft has prompted extensive debate would be an understatement. With the Division awaiting a Tunney Act ruling on the proposed final judgment, and nine (9) states, the District of Columbia, and Microsoft engaged in a trial on the far-reaching remedies proposed by the states, it is appropriate to discuss the Division's case and why it is satisfied that it has

obtained a remedy that is in the public interest. Quite simply, we are satisfied because we believe our remedy fully resolves the monopoly maintenance claim that the court of appeals sustained.

When the case emerged from the court of appeals late last June, we carefully reviewed the opinion and immediately began discussing what it meant for our pursuit of a remedy. Third parties, some of which had been witnesses for the Government in the liability phase, lobbied heavily. In proposing an appropriate remedy, we had no mandate to regulate or to make policy for the computer software industry. Rather, our mandate was to seek to redress the serious antitrust violation for which the court of appeals sustained liability. It was also our strong view that the public interest required redressing the violation as soon as possible.

To place this in context, it is important to trace the case from the beginning. The United States' case originally included four counts: (1) illegal maintenance of Microsoft's monopoly position in operating systems for Intel-based personal computers; (2) attempted monopolization of the web browser market; (3) illegal tying of the web browser, Internet Explorer, to the operating system; and (4) exclusive dealing. The states' case included the same four counts, as well as two additional counts: (1) maintenance of Microsoft's monopoly position in the market for office productivity suite software; and (2) monopoly leveraging.

The states dropped their monopolization claim involving office productivity suite software. The district court granted summary judgment in favor of Microsoft on the

states' monopoly leveraging claim. After trial, the district court found in favor of the United States and the states on monopoly maintenance, attempted monopolization, and tying, but did not find that Microsoft had engaged in illegal exclusive dealing. The court then imposed the remedy that we and the states had requested, which included interim conduct relief for one year, followed by a break-up of the company into two separate entities.

On appeal, the D.C. Circuit upheld the monopoly maintenance finding based on 12 anticompetitive acts, but rejected eight other specific acts and Microsoft's "course of conduct" as a basis for liability. The court of appeals also reversed the attempted monopolization finding of liability; vacated the per se tying finding of liability and remanded the claim for review under the rule of reason standard; and vacated the remedy, providing guidance for the remedies proceeding on remand. In its own words, the court "drastically altered the District Court's conclusions on liability." As responsible government enforcers, we had no choice but to account for those alterations as we determined the appropriate remedy to seek. And, indeed, the district court judge stated that she expected us to do so.

The court of appeals admonished that a structural remedy would be appropriate only if, on remand, we proved a more direct causal connection between Microsoft's exclusionary practices and maintenance of the operating system monopoly, a connection that the district court said it could not find. It was clear that the court did not favor a structural remedy. Given the court's statements on remedy, and the nature of the

exclusionary practices that the court upheld as unlawful, a conduct remedy seemed all that could be secured, let alone justified. Once we came to that conclusion, we immediately informed Microsoft and the court, fearing that holding out the prospect of structural relief as a bargaining chip would only cause delay as Microsoft were permitted to raise and explore a host of issues relating to such a remedy, and potentially would try the patience of the new district court judge, who undoubtedly had read the court of appeals' not-so-subtle message about structural relief.

Turning to conduct relief, the remedy had to stop the offending conduct, prevent its recurrence, and restore competitive conditions. It had to go beyond just prohibiting the exact conduct found unlawful to address conduct of a similar nature and to require restorative actions, while still keeping a foundation in the offending conduct. It had to take into account changes in the marketplace. And it had to be implemented as quickly as possible. While we were internally and with the states discussing the appropriate remedies to seek, the district court ordered us to try to settle the case, negotiating 24/7 over a period of five weeks, first without a mediator and, if necessary after a period of time, with a mediator.

Negotiate we did for five weeks, and ultimately we reached a settlement. Nine states also agreed to settle. Nine other states, and the District of Columbia, however, did not settle and are, as you know, in trial at this moment. During the 60-day comment period, we received over 30,000 comments, many of them via email. We carefully reviewed all of the comments, made some minor clarifying changes to the settlement

agreement, and filed our detailed response in late February. The district court judge held a hearing on the settlement on March 6, and currently has the matter under advisement.

In the on-going litigation, Microsoft moved to dismiss the non-settling states' case on the ground that they lack standing because, in sum, they have not demonstrated injury specific to their states, apart from injury to consumers nationwide. Not only the non-settling states, but also the settling states and states that were never involved with the case filed amicus briefs supporting the non-settling states. The court asked the United States to file an amicus brief, which we filed this past Monday. We take the following positions in our brief: (1) the United States is the sole enforcer of the federal antitrust laws on behalf of the American public; (2) Microsoft did not, however, establish that precedent requires dismissal of the non-settling states' case as a matter of law; and (3) the limitations of Clayton Act Section 16 (under which the states occupy the position of private parties, not sovereigns), as well as the fact that the United States has made an enforcement judgment in the case, should be taken into account in the court's exercise of equitable discretion.

The settlement we reached with Microsoft stops the conduct found unlawful by the court of appeals by broadly banning exclusive dealing, prohibiting a broad range of retaliatory conduct, and giving computer manufacturers extensive control of the desktop. In crafting a remedy that would also prevent the recurrence of the unlawful conduct, we considered the wide range of strategies at Microsoft's disposal, given its position in the market. The settlement prevents recurrence of such conduct using broad concepts of non-

discrimination and non-retaliation. In fashioning this remedy, we did, however, recognize that some forms of collaboration are procompetitive, and drafted specific, limited provisions to allow this type of conduct. This is what some firms — primarily Microsoft's competitors — have labeled as "loopholes" in the settlement. The consent decree also uses a broad, and necessarily complex, definition of middleware. It includes not only current middleware products, such as browsers, email client software, networked audio/video client software, and instant messaging, but also future products that have the potential to be a similar threat to the operating system.

The settlement also restores the lost competitive conditions in the market by restoring the *potential* threat posed by middleware. Many have argued that the remedy does not go far enough because it does not take away Microsoft's operating system monopoly. However, there was never any allegation that Microsoft unlawfully acquired its monopoly, and the district court and court of appeals found that middleware represented a *potential* or nascent threat — not necessarily a current threat that would topple the operating system. The consent decree restores the potential threat through a series of disclosure and design provisions. Microsoft must disclose all APIs (application programming interfaces) in the operating system if Microsoft middleware products rely on them. This will ensure that non-Microsoft middleware is able to interoperate with the operating system and compete on a function-by-function basis with Microsoft middleware. Microsoft must also allow computer manufacturers and end users to replace Microsoft middleware and preserve "default" settings that will ensure that Microsoft's

middleware does not override the selection of competing middleware products. The consent decree also requires Microsoft to license communications protocols that allow its servers to interoperate with the operating system, given the potential threat that server-based applications may pose to the Windows monopoly.

On the issue of enforcement, some have suggested that no conduct remedy would be effective in this case because Microsoft is defiant and cannot be trusted. Our practice in enforcement, however, is never influenced by the degree to which we "trust" a defendant. We assume that companies will always pursue their own best interests, which are not necessarily coincident with the public interest, and we fashion remedies accordingly. Our decree includes some of the most stringent enforcement provisions ever included in a decree. In addition to ordinary prosecutorial access powers, backed by criminal and civil contempt authority, the decree has two aggressive features: (1) an independent, full-time, on-site compliance team, including staff and consultants, with the authority to monitor compliance, report violations, attempt to resolve technical disputes, and gain full access to Microsoft's business, employees, and records, including its source code; and (2) extension of the decree's term by up to two years if the court finds willful, systematic violations of the decree.

There are those who complain that we should have "punished" Microsoft by taking away its operating system monopoly, even though we never alleged that Microsoft unlawfully acquired its monopoly. Others lament the lack of a monetary penalty. Of

course, these criticisms will not be debated seriously in antitrust circles because we have no authority to "punish" a civil defendant or seek fines or damages.

Many of Microsoft's competitors have protested loudly. Many of them provided valuable assistance to the Division during the liability phase, and their opinions on remedy were made known to us during the remedy phase. In fact, after the President announced his intention to nominate Charles James as Assistant Attorney General, the lobbying began, prompting Charles to adopt the rule that he would not meet with third parties, though he would read anything they submitted in writing.

Requests were made that we agree to remedies that, in our view, would have crippled Microsoft, while greatly advantaging its competitors. Indeed, many of these remedies bore little relation to our case. Economists call this behavior "rent seeking." In the states' trial, Microsoft has introduced evidence that at least suggests that some companies sought advantageous deals with Microsoft in exchange for a promise to stop assisting the DOJ in its case or to tell us to back off. I had never doubted for one moment that these companies were behaving strategically, and, at times, their interests may align with the public interest. But it is an important reminder to us at DOJ that we must make our own judgments based on our own assessment of the marketplace. DOJ does not regulate competition in the software industry, and it does not pick the winners and losers. We enforce the law for the benefit of consumers. And that's exactly what we did in the Microsoft case.

Clearance

I have been asked to say a few words about our new clearance agreement with the FTC. As you know, the Department's and the FTC's respective jurisdiction in federal antitrust enforcement is largely overlapping. To avoid duplicative enforcement efforts, allocation has always been worked out by agreement between the two agencies. Generally, matters have been allocated according to experience with the relevant product market in the past five years. This worked well in a high percentage of cases, but many times clearance disputes would arise because of an agency's concern that granting clearance to the other agency would permit the other agency to gain experience, and, perhaps, "capture" that industry. When we arrived, there was a non-merger matter that had been held up in clearance for nearly 16 months. We fairly quickly sought a neutral party and successfully mediated the dispute.

From that point on, Charles James and Tim Muris were determined not to let that happen again. They sought advice from former agency officials on how to fix the problem. In January, we hammered out an agreement between the two agencies. Despite what you have been reading, the agreement does more than simply allocate industries to one agency or the other. The agreement contains important and improved procedures on timing, synchronization, and inter-agency communication. It provides for a convergence committee to hammer out allocations as industry lines blur and sets forth a neutral dispute resolution process, if necessary.

Of course, the allocation of industries is what has some people riled up. However, as was previously the case, the allocation is based on the historical experience at the agencies. The agreement provides that all media and telecommunications matters will be handled by the DOJ, and that, in particular, has made some unhappy, notwithstanding that the Department has, by far, the most experience in media investigations and all of the experience in telecommunications investigations. That means that, even if the two agencies had continued to proceed under the old agreement, the DOJ would have continued to handle most media and all telecommunications matters. Given that the objections to the new agreement cannot therefore, be based on any "reallocation" contrary to historical experience, the objections presumably are based on the objectors' desire to move the review of media matters to the FTC.

Plain and simple, we entered into the agreement because it was the right thing to do. Taxpayers lose when the agencies waste time fighting for turf. Both agencies are equipped to enforce the antitrust laws. The noise that surrounds the agreement simply underscores the need for it, in my view.